

DATE: February 23, 1995

Case No. 90-JTP-32

In the Matter of

MISSISSIPPI DEPARTMENT OF
ECONOMIC AND COMMUNITY
DEVELOPMENT

Complainant

versus

U.S. DEPARTMENT OF LABOR

Respondent

APPEARANCES:

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For the Respondent

BEFORE: QUENTIN P. MCCOLGIN
Administrative Law Judge

DECISION AND ORDER

This case arises under the Job Training Partnership Act, 29 U.S.C. § 1601 et. seq., ("JTPA"), and its implementing regulations at 20 C.F.R. Part 29. The Office of Inspector General performed an audit of fixed unit price performance-based contracts negotiated between the Mississippi Service Delivery Area (MSDA) and the Mississippi Employment Security Commission

(MESC) for On-the-Job training programs and Individual Referrals.

Through the JTPA, the MSDA received funding allocated to the Governor of the State of Mississippi through the Governor's agent, the Mississippi Department of Economic and Community Development (MDECD).

The Inspector General issued an audit report on January 26, 1990 that questioned \$1,907,734. The matter was forwarded for resolution to the Employment and Training Administration, Office of Audit, Closeout and Appeals Resolution. On July 25, 1990, the Grant Officer issued a Final Determination which disallowed \$1,907,734, but reduced the amount subject to debt collection to \$1,370,347, based on a review of MDECD's resolution proposal. On August 20, 1990, MDECD appealed the Grant Officer's Final Determination to the Office of Administrative Law Judges. The hearing in this matter took place on June 16 and 17, 1994 in Jackson, Mississippi.

SUMMARY OF THE FACTS

In 1984, MSDA and MESC entered into negotiations to establish a per-participant cost that resulted in a \$2,000 fixed unit price for the on-the-job training contracts and a \$2,100 fixed unit price for the individual referral contracts. (Tr. 201; RX-3, pp. 7-8). The 1984 contract contained a clause allowing the parties to renegotiate the fixed unit prices if the current pricing system caused MESC to operate at a loss. This clause provides:

To assure that MESC will not operate at a loss, this fixed unit price will be renegotiated if factors result in costs in excess of those negotiated in the development of the unit price.

RX-7, pp. 7-8.

At the end of 1984, MESC made a profit of \$1,506,296 from its fixed unit price contracts, of which \$500,000 was refunded to MSDA. (RX-1, p. 51).

Because the amount of profit earned in the first year on the fixed unit price contracts was so high, MESC and MSDA renegotiated the fixed unit price for the on-the-job training contracts in succeeding years and reduced the price per participant to \$1,800. (Tr. 206; RX-1, p. 34). The fixed unit price for the individual referral contracts remained the same at \$2,100. (Tr. 206). The renegotiation clause present in the 1984 contract was eliminated in succeeding years. (RX-1, p. 51).

MESC earned \$552,063 in profits in 1985, \$597,817 in profits in 1986, and \$231,698 in profits in 1987. (RX-1, p. 51). The total amount of profits earned in program years 1984-1987 was \$2,887,874. (RX-1, pp. 49, 51; Tr. 49). The auditors and the

Grant Officer disallowed as unnecessary and unreasonable costs the aggregate amount of profits earned for the program years 1984-87 from the fixed unit contracts. However, the Grant Officer credited the State for profits spent to further JTPA activities and for \$500,000 refunded to the MSDA, leaving \$1,593,153¹ questioned. (RX-1, pp 12, 49).

Of the \$1,593,153 questioned, the Grant Officer disallowed \$906,721 in unexpended profits because he determined that the fixed unit price per contract was not based on adequate cost and price analyses and that the contracts abolished the risk of loss associated with fixed unit price contracts. (RX-1, pp. 20-21, 49). Id. at 20-21. However, the Grant Officer also determined that only \$369,334 of the \$906,721 was subject to debt collection because the state could show that an additional \$537,387 was expended in PY 1988 and PY 1989. Id. at 13. The Grant Officer reported that the \$369,334 was subject to debt collection "unless the State can provide documentation of additional PY '89 expenditures from the profit account for JTPA allowable activities pursuant to the MESC Order No. 1."² The \$314,581 in interest earned on the cumulated profits for years 1984-87 was further disallowed and determined to be subject to debt collection. Plus, an additional \$686,432 in profits spent on Project Upgrade were disallowed and found to be subject to debt collection because the Grant Officer determined that MESC did not demonstrate that the upgraded individuals were JTPA eligible at the time of the upgrade training. (RX-1, pp, 22-23, 37, 42-43; Tr. 47). This left a total of \$1,370,374 that the Grant Officer found to be subject to federal debt collection. (RX-1, p. 9).

DISCUSSION

The theory of recovery advanced in support of the Grant Officer's position is that all profits earned from the fixed-price contracts are recoverable because they violate 20 C.F.R. Section 629.37,³ which provides:

¹ \$2,887,874 total profits minus total approved expenditures of \$1,294,721 (\$500,000 refunded to MSDA; \$84,192 for computer system; \$1,052 for workmen's compensation insurance; and \$709,477 for work experience) equals \$1,593,153 in profits questioned. (RX-1, p. 51).

² Id. The Grant Officer recited that MESC Order No. 1, dated February 12, 1990, authorized additional PY 1989 expenditures from the profit account, but he noted that the State did not provide documentation that such expenditures were actually made. Id.

³ See Tr. 80-81, 89, 150, 152; RX-1, p. 33.

To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allocable thereto under these principles, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or subreceptient.

20 C.F.R. § 629.37(a).

The Grant Officer concedes that states were allowed to enter into fixed price contracts during the years 1984-87. (Tr. 94). However, it is the Grant Officer's position⁴ that all profits from the fixed price contracts are unnecessary and unreasonable because the contracts were not based on adequate cost analyses; they eliminated the possibility of risk for poor performance and inflated the cost of providing training; and, the contract terms and payment were lenient, allowing express cash balances and profits. (RX-1, pp. 19-24, 33). Although the parties reduced the fixed unit prices of the on-the-job training contracts in years 1985-87, the auditors and the Grant Officer still determined that the profits earned in those years were unnecessary and unreasonable. (Tr. 44; RX-1, pp. 21, 34).

The Grant Officer further concedes that until 1989, grantees were not required to account for profits earned on "properly-negotiated" contracts. (Tr. 96). It is the Grant Officer's contention, however, that the contracts for the years 1984-87 were negotiated improperly. Hence, it is his further contention that all profits recognized therefrom, together with interest earned on those profits, are recoverable. There is undisputed evidence that the 1984 on-the-job training contracts contained a clause allowing the parties to renegotiate the fixed unit price if the actual costs exceeded the negotiated costs. (RX-7, pp. 7-8). This provision "contains characteristics of both fixed unit cost contracts and cost reimbursement contracts" which effectively takes the contract out of the fixed price category. State of Florida, Department of Labor and Employment Security v. United States Department of Labor, 92-JTP-17, (December 5, 1994), p. 6, (referring to 20 C.F.R. § 629.38(e)(2), quoted in the decision on pages 3-4, n.2). Based on the Florida decision, the 1984 on-the-job training contracts are invalid because they are not true fixed price contracts.

The testimony about the contract negotiations, together with the negotiation notes, further support the conclusion that the 1984 on-the-job training contracts did not contain adequate cost

⁴ It is not the Grant Officer's position that the fixed-price contracts between MESC and MSDA are prima facie improper because the contracting parties were two units of the same state agency. (Tr. 95, 152-53).

price analysis because after factoring in all available historical data and also allowing a five percent inflation factor, costs were inflated an additional five percent. (Tr. 99, 139). This additional five percent factor was explained as an anticipated staff pay raise, but was really an added cushion. Id. at 234-35, 335. This conclusion is borne out by the high amount of profits generated in the first year, which was twenty-five percent of the total 1984 revenue. (RX-1, p. 51).

Nevertheless, while it is possible that inadequate cost price analysis can ultimately cause a contracting party to either bear a bigger risk of loss or realize a larger profit than anticipated, such a flaw does not suggest that the contracting parties did not engage in rigorous negotiations. Thus, the Grant Officer's theory that inadequate cost price analysis signifies per se "improper contract negotiation" is rejected. (Tr. 97). There was no allegation by the Grant Officer in this case that the parties were not engaged in arm's length transactions. Unlike the situation in the Florida decision, wherein the profits on the fixed price contracts were disallowed because the Secretary determined that there were not arms' length transactions between parties that were within the same branch of state government, (Florida, 92-JTP-17 (December 5, 1994) at pp. 2-3, 10), this theory of liability was not advanced in this case. To the contrary, the Grant Officer testified:

A. Well, the question was does -- I think the question was does the fact that you had two state agencies negotiating with each other raise an issue which might require being looked at in more detail, and I think I responded that yeah, it can raise a question of whether or not two parties are actually engaged in arm's length negotitaions. And I also said in response to that question we did not make that issue in here at all, even though both of the parties were, you know, were suborganizations within the same unbrella department. It's not in the audit report, it's not in the resolution.

Q. Okay. So the arm's length relationship had nothing to do with --

A. We made no finding with respect to the independence of the parties or made any comment.

(Tr. 152-53).

Moreover, there is insufficient evidence to establish similar infirmities of the 1984 contracts with the succeeding years' fixed-price contracts. The evidence is undisputed that the renegotiation clause present in the 1984 contract was omitted

from the fixed price contracts in the subsequent program years and the parties lowered the costs for the on-the-job training contracts in those years, as well. (RX-1, p. 34-35). Additionally, there is no evidence in the record that would support the conclusion that the fixed price contracts in program years 1985-87 contained inadequate cost price analyses. The Grant Officer concluded that the parties' negotiated price was too high in program year 1984. (Tr. 94). The auditors' findings of inadequate cost analysis and no risk of loss were made with reference to the 1984 contracts. (Tr. 94; RX-1, pp. 34-36). These conclusions and findings with respect to the 1984 contracts, however, are not conclusive as to the succeeding years' contracts.

The absence of negotiation notes for the succeeding years' contracts is not persuasive on the issue of improper negotiation. One would not expect the negotiations in the succeeding years to be the same as for the first year because the parties are more familiar with the factors involved and there is not the same need for historical data as was the case in the negotiation of the first year's contracts. In addition, the costs were increasing each year even though the contract price was reduced from \$2000 to \$1800 in PY 1985 and remained at \$1800 for PY 1986-87 despite the increase in costs. (RX-1, pp. 31, 51). More importantly, the profits were significantly reduced in each succeeding program year after 1984 and did not exceed ten percent thereafter. Id. at 51. Even the Grant Officer conceded that a ten percent profit may not have been unreasonable. (CX-2, p. 25; Tr. 140).

Based on the foregoing, there has been no showing that the contracts for years 1985-87 are invalid. To the contrary, the contracts are valid according to the regulations that allow fixed price contracts and necessary and reasonable costs. 20 C.F.R. §§ 629.37 and 629.38(e)(2). As the contracts for years 1985-87 are valid, the profits derived therefrom together with the interest are allowable as there were no regulations in effect before 1989 that required the profits to be channeled back into approved program activities: "[T]he policy was that . . . profits earned on contracts that were properly negotiated . . . would have been the state's to do with as they chose [A]nd the interest it subsequently earned on those dollars would have been the State's to do with it as it saw fit" (Tr. 96, 150-51). Accordingly, the profits and interest earned in program years 1985-87 are the state's to do with as it chooses.

However, because the 1984 on-the-job training contracts violated the fixed-price provision of 20 C.F.R. § 629.38(e)(2), the state must account for the profits generated therefrom. The rule in effect at the time the contracts were promulgated provided that misexpenditures were required to be reprogrammed into the same JTPA program within the year the funds were obligated by the U.S. Department of Labor or the two succeeding

program years. (See ETA Training and Employment Guidance Letter No. 2-87, submitted herein as CX-13; Tr. 119-20). Applying this rule, the auditors and the Grant Officer allowed a portion of the profits cumulatively earned in program years 1984-87 (including profits from the faulty contract year 1984) because they were found to be spent on allowable activities. (RX-1, pp. 29, 51).

Complainant contends that the first year's profits were all spent to go back into the job training program on a first-in/first-out basis. However, the only documentation of the expenditures of the 1984 profits is contained in the Inspector General's audit which specifies that of the \$1,506,296 profits generated in program year 1984, only \$500,000 was refunded to the MSDA and \$84,192 was spent on a computer program. (RX-1, p. 51). Both of these expenditures occurred in 1985. There were no profit expenditures in 1986 other than an unspecified amount for Project Upgrade, which started in PY 1986, but ended in PY 1987, and had a total expenditure of \$686,432. Id.

Project Upgrade, a program whereby money⁵ was allocated to employers to "upgrade" a current employee to a higher position to create a vacancy for a JTPA-eligible employee, was determined by the auditors and the Grant Officer not to be an approved activity under the JTPA. Id. at 14-15, 42-43, 262, 384. The Grant Officer concluded that the profit expenditures on Project Upgrade violated the provisions of the Act and the regulations that required participants to be "economically disadvantaged"⁶ because the State imposed no requirement that the upgraded individuals themselves be JTPA-eligible. (RX-1, pp. 42-43). The Project Upgrade proposal itself did not contain a mandate that the upgraded individuals qualify under the Act and the state conceded that it did not ensure that the upgraded individuals themselves were, in fact, JTPA-eligible. (CX-12, p. 5; Tr. 384). Hence, it is found that whatever profits from the 1984 contracts that were spent on Project Upgrade in program year 1986 were not spent on approved JTPA activities because the State of Mississippi did not ensure that the upgraded individuals were JTPA eligible in

⁵ Profits generated from the on-the-job contracts funded Project Upgrade. (RX-1, p. 51).

⁶ Under the JTPA, individuals are eligible to participate in JTPA programs only if they are economically disadvantaged as defined by Section 1503(8). 29 U.S.C.A. §§ 1503(8) and 1603(a)(1) (1985). The Act mandates that each administrative entity be responsible for the allocation of funds and the eligibility of those enrolled in its programs. Id. at § 1551(i). The regulations implementing the Act also require the state to maintain records of each participant's enrollment in a JTPA program in sufficient detail to demonstrate compliance with the relevant eligibility criteria. 20 C.F.R. § 629.35(c)(1989).

accordance with sections 1503(8) and 1603(a)(1) of the Act. 29 U.S.C.A. §§ 1503(8) and 1603(a)(1).

Complainant submitted a summary of projects funded with MESC profits, but this summary does not show additional expenditures of 1984 profits that were spent on approved activities within the three year period of availability that were not already accounted for by the auditors or the Grant Officer. (CX-15). Accordingly, it is found that of the \$1,506,295 generated in profits from the 1984 contracts, \$922,104 is subject to debt collection because it was not proved to have been spent on JTPA-allowable activities within the three year period of availability from 1984-86.

In addition, the Grant Officer seeks reimbursement of \$314,581 in interest cumulatively earned on the profits in program years 1984-87. However, as the profits and interest from the contracts from PY 1985-87 have been determined to be allowable and not subject to debt collection, only the portion of interest attributable to the 1984 profits not spent within three years on JTPA-allowable activities (\$54,496.35)⁷ will be considered in dispute. The Grant Officer treated the disallowed profits as Title II money and determined that interest earned on disallowed Title II dollars should be returned to the Department of Labor. (Tr. 104-05). Although not advanced in the initial audit or Final Determination, the Grant Officer's post-hearing brief cites OMB Circular A-102 (January 1981) entitled Uniform Requirements for Assistance to State and Local Governments, as authority for returning interest on disallowed funds. OMB Circular A-102 mandates that "interest earned on advances of Federal funds shall be remitted to the Federal agency except for interest earned on advances to States as provided by the Intergovernmental Cooperation Act (ICA) of 1968." At the time of the audit and for the program years in question, the ICA did not require states to return interest earned on grant money pending its disbursement for program purposes. 31 U.S.C.A. § 6503(a)(1985). The Grant Officer maintains that cases interpreting the ICA have held that the statute does not apply to long-term holdings of Federal funds or to situations where a state has wrongfully procured federal funds and held them pending repayment.⁸ In addition, the Grant Officer argues that the

⁷ $\$922,104 \times 5.91\% = \$54,496.35$. The interest rate of 5.91 percent represents the average monthly interest rate earned on the Mississippi General Fund from August 1985 through June 1988. (RX-1, pp. 50-51). The information on the account balance was provided by the MESC during the IG's audit. (Tr. 47).

⁸ See Grant Officer's Post-Hearing Brief, pp. 33-35, (quoting Commonwealth of Pennsylvania Office of Budget v. Department of Health and Human Services, 996 F.2d 1505, 1511 (1993); State of North Carolina v. Heckler, 584 F. Supp. 179,

federal government can recoup prejudgment interest on a debt arising from a contractual relationship between the state and federal government.⁹

MDECD contends that even if the profits are unallowable, the Department of Labor has no jurisdiction over the interest. MDECD cites section 1574 of the Act, which provides: "Every recipient shall repay to the United States amounts found not to have been expended in accordance with this Act. The Secretary may offset such amounts against any other amount to which the recipient is or may be entitled under this Act" 29 U.S.C.A. § 1574(d).¹⁰ MDECD argues that this section allows the Secretary to sanction recipients for spending grant funds on unallowable costs, but does not invent new ways to claim revenue for the federal government. MDECD further asserts that OMB Circular A-102 and the ICA were not relied on in either the Inspector General's initial audit or the Grant Officer's Final Determination, and are inapplicable in this case because they were not incorporated into the JTPA. MDECD further maintains that even if the principles of the ICA applied to JTPA grant funds, the cases cited by the Department of Labor are not on point because the interest was not accrued by the recipient (MDECD), but by the subcontractor (MESC) and the interest did not accrue on funds pending disbursement because MDECD had already disbursed the funds to MESC at the time the funds earned interest.

The OMB Circular A-102 issued in January, 1981 concerns program income and governs interest earned on advances of federal funds and incorporates section 6503(a) of the ICA. These provisions were in effect prior to the enactment of the JTPA, and thus it appears that they would apply to advances of federal funds under the JTPA. Under the circular, program income is defined as "gross income earned by the grantee from grant supported activities. Such earnings exclude interest earned on advances." (OMB Circular A-102, attached to Grant Officer's post-hearing brief). Interest earned on advances is dealt with in another section of Circular A-102 and is required to be remitted to the federal agency, except for interest earned on advances to states or instrumentalities as provided by the ICA. Id. The ICA specifically provides that a state is not accountable for interest earned on federal funds pending disbursement, 31 U.S.C.A. § 6503(a)(1985), although the cases

185-86 (1984)).

⁹ Id. at pp. 35-36, (quoting West Virginia v. United States, 479 U. S. 305, 310-312 (1987)).

¹⁰ Complainant's Post-Hearing Brief, pp. 9-10 (quoting 29 U.S.C. § 1574(d)).

interpreting this provision have held that it only applies to the period when the state temporarily holds federal grant money designed for prompt transfer, and does not apply to a situation where a state improperly received funds to which it was not entitled. Commonwealth of Pennsylvania, 996 F.2d at 1511; Heckler, 584 F. Supp. at 185.

Under the definitions cited in the circular, the profits generated from contract year 1984 would be considered "program income" because the profits were "income earned by the grantee from grant-supported activities." (RX-1, p. 3). "Program income" does not include advances on federal funds and is treated differently than advances on federal funds. (OMB Circular A-102, January, 1981). In this case, the interest questioned by the auditors and the Grant Officer was earned on profits or "program income" and not on advances of federal funds. (RX-1, pp. 13,29). Thus, the Grant Officer's reliance on the cases interpreting ICA section 1503(a) do not apply here. The cases cited by the Grant Officer do not address a situation wherein profits or "program income" have generated interest, but rather these cases deal with the issue of the initial federal grant monies being held in an interest-bearing account prior to the state's disbursing them at all.

Moreover, the Grant Officer's assertion that pre-judgment interest is recoverable on a debt arising from a contractual relationship between the state and federal government does not apply to this case. Here, there is no contractual relationship between Mississippi and the U.S. Government for the performance and payment of services between parties as was the case in West Virginia.¹¹ Rather, this case arises out of the specifics of a federal statute.

However, the Grant Officer's determination that the interest earned on profits generated from faulty contracts must be accounted for, is reasonable. Since the 1984 contracts were flawed, which in turn resulted in large profits and interest earned thereon, both the profits and interest from the 1984 contracts can be considered misexpenditures of federal funds. As such, the ETA regulations required misexpenditures to be spent on approved program activities within the three year period of the initial obligation of funds. (CX-13). There is no evidence that MESAC spent any portion of the interest earned on the \$922,104

¹¹ In that case, a federal agency entered into a contract with the state of West Virginia to prepare sites for mobile homes following a flood, after which services were performed, the state did not remit payment. West Virginia, 107 S.Ct. at 704. The Court determined that prejudgment interest was applicable when the underlying claim is a contractual obligation to pay money. Id. at 706.

remaining in the account on approved activities within three years. Accordingly, the Act itself provides that "Every recipient shall repay to the United States amounts found not to have been spent in accordance with this chapter." 29 U.S.C.A. § 1574(d).¹² Under the regulations, the Secretary may impose appropriate sanctions and corrective actions for violations of Section 1574(d), including holding the Governor (or in this case the MDECD as agent for the Governor of Mississippi) responsible for all funds under the Act, including those received by a subrecipient. 20 C.F.R. §§ 629.44(a) and (d)(1). Accordingly, as provided for in the Act and the regulations, it is thus found that the \$54,496.35 in interest earned on the unspent profits generated from the 1984 contracts is subject to debt collection.

In conclusion, the Final Determination of the Grant Officer dated July 25, 1990, disallowing \$1,907,734 in profits and interest and subjecting \$1,370,347 to federal debt collection on the theory that all the contracts for program years 1984-87 were improperly negotiated, is reversed. However, the Grant Officer's finding that the 1984 contracts were not valid fixed-price contracts is affirmed, and the amount of \$976,600.35 in profits and interest derived from the 1984 on-the-job training contracts is subject to debt collection because it was not shown to have been spent on JTPA-approved activities within three years of DOL obligation.

QUENTIN P. MCCOLGIN
Administrative Law Judge

Metairie, Louisiana

QPMC:mef

¹² Although section 1574(d) further provides that the Secretary may offset such amounts against further monies to which the recipient is further entitled under the JTPA, it does not require the Secretary to do so. Id.